

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

Cause No. 15-4268 JB

v.

**ANGEL DELEON,
JOE GALLEGOS,
EDWARD TROUP,
BILLY GARCIA,
ALLEN PATTERSON,
CHRISTOPHER CHAVEZ,
ARTURO ARNULFO GARCIA,
MARIO RODRIGUEZ,
MAURICIO VARELA
DANIEL SANCHEZ,
CONRAD VILLEGRAS,
ANTHONY RAY BACA,
CHRISTOPHER GARCIA,
CARLOS HERRERA,
RUDY PEREZ,
ANDREW GALLEGOS,
SHAUNA GUTIERREZ, AND
BRANDY RODRIGUEZ.**

Defendants.

**GALLEGOS DEFENDANT'S MOTION TO DISMISS
(PREINDICTMENT DELAY)**

Defendants hereby respectfully moves this Court to dismiss Counts 4 and 5, with prejudice, as a result of the pre-indictment delay consisting of three years time after a magistrate's preliminary hearing determined that the State of New Mexico was not able to prove there was sufficient probable cause to determine that movants had murdered Adrian Burns in 2012. As grounds, counsel states:

I. Factual Background

The movants through counsel would show that the following facts are relevant and necessary to enable the Court of fully understand the significance of the underlying events and the legal and factual bases supporting the requested dismissal and why the movants are prejudiced and denied their constitutional rights:

- a. On November 12, 2012 Adrian Burns was found dead in a burned-out vehicle. An autopsy later determined he had been shot by a .22 caliber weapon and was in the vehicle when it caught fire.
- b. On or about November 20, 2012, Andrew and Joe Gallegos are arrested and taken into custody at a local hotel.
- c. Defendant Joe Gallegos had been charged with; Murder in the 1st degree (open charge), Kidnapping (to inflict death, physical injury or a sexual offense on the victim - 1st degree), Tampering with evidence (3rd degree), Conspiracy to commit a felony (2nd degree), and Arson (over \$2500), in Cause No. M-52-FR-2012-00231.
- d. On or about December 6, 2012 the state Magistrate Judge held a probable cause hearing pursuant to state statute 5-302 NMSA. The State called multiple police officers and civilians as witnesses. After hearing all of the State's evidence, the Judge determined that there was a "Failure to Make Showing of Probable Cause" and the complaint was dismissed. *See Exhibit "A".*
- e. On November 13, 2014 the records of these and other related proceeding were destroyed.¹

See attached Exhibit "B" the Party Information Sheet for Cause No. M-52-FR-2012-00231.

f. On or about December 5, 2015 the defendant Joe Gallegos was charged by indictment in the Federal District of New Mexico *United States v. Angel Deleon et al.*, Cause No. 15-CR-04268-KG. The general thrust of the indictment included allegations that Joe Gallegos had murdered “F.C.” on March 26, 2001 “as consideration for the receipt of, and as consideration for a promise and agreement to pay, anything of pecuniary value from the Syndicato de Nuevo Mexico Gang (SNM) and for the purpose of gaining entrance to and maintaining and increasing position in the Syndicato de Nuevo Mexico Gang....” [DOC 2. Count 1]. The indictment never mentioned the 2012 murder of Adrian Burns.

On or about April 21, 2016 in [Doc. 368] the Government filed its Superseding Indictment against Joe Gallegos and added Counts 4 and 5 against him. Additionally the Government added Andrew Gallegos as a defendant and charged him in the indictment in only Counts 4 and 5. During the time period from 2012 to April 21, 2016 it is believed that the United States Government maintained files that listed Joe Gallegos as a suspect in one or more offenses and that they were aware of the failed prosecution in relation to Adrian Burns’ murder.

II. The Law

In order to prevail on this Motion, Messrs. Gallegos, movants must show both that they were prejudiced by the pre-indictment delay and that the delay was motivated by the government’s desire to obtain a tactical advantage. *United States v. Marion*, 404 U.S. 307, 323 (1971), *United States v. Lavasco*, 431 U.S. 783, 789 (1977), *United States v. Wood*, 207 F.3d. 1222, 1234 (10th Cir. 2000), *United States v. Abdush-Shakur*, 465 F.3d 458, 465 (10th Cir. 2006). In evaluating a Due Process claim, the Court must consider both prejudice to the defendant and the reasons for the delay. *Lavasco*, 431 U.S. at 790. If the delay was extensive, which it clearly

was in this case, the violation of the principles of Due Process may be excused if the delay was caused by an active investigation.² *Lavasco*, 431 U.S. at 796. The decision to bring charges relating to the 2012 homicides was not based on complications resulted from an active and ongoing investigation, but rather to prejudice the defendant by the introduction into evidence and



then parading before the jury gruesome pictures of the charred corpse of Mr. Burns and the alleged brutality involved in his demise. Movants have filed a Motion for a Bill of Particulars [DOC. 1143] requesting information that the Government has to support their

claim that the murder of Adrian Burns was done in consideration of and for the purposes ascribed in Counts 1 and 2. The Government's response has been akin to that of Prince Hamlet's last words, "the rest is silence." Wm. Shakespeare ."*Hamlet Prince of Denmark*, Act V, Scene II, Alfred Harbage ed., Penguin Books, Inc. 1969. The decision to bring charges relating to these formerly dismissed state homicides was motivated by the Government's desire to incite and pander to the jurors passions and prejudices rather than make decisions and reach conclusions based on rational and logical thought unmoved and undirected by prejudice and passion.

III. Prejudice

During the initial investigation in 2012 a hearing was conducted that resulted in a determination that a particularly brutal murder failed to meet the lowest standard in criminal

² Interviews of witnesses appear to have begun anew after the Superseding Indictment.

law—probable cause.. The testimony of the officers and other witnesses at that hearing has long since been destroyed. *See Exhibit “B”.* The government profited from its destruction and the loss of testimony that was beneficial to the movants.

The officers who participated at that hearing have been schooled in their mistakes and their testimony will be necessarily tightened to present the Government’s case in the most damaging light. Further, the Government has not produced any statements that it has in its possession that may have been obtained or notes thereof, presumably classifying these as Jenks statements. In reality, based on the outcome of the hearing, arguably any information relating to the testimony or notes of any officer involved in the 2012 investigation should be classified as *Brady* material because of the state magistrate’s findings in the probable cause hearing and his subsequent ruling. *See Exhibit “A.”.*

The prejudice, as described above, becomes more manifest because the prosecution plays a cat-and-mouse game with discovery. The government refuses to provide *Jencks’* statements until two weeks before trial. The government has failed to fully disclose and provide *Giglio* and *Brady* materials in good faith.³ Thus, Movants suffer ongoing prejudice. The prejudice caused by the delay might have been ameliorated a bit if the government had had: 1) properly

³ The government’s strategies and hide and seek gamesmanship is apparent from its response to Defendants Billy Garcia and Edward Troup’s Second Motion to Compel [DOC 1275, 9/29/17]. On its response it advances as an argument for its continued refusal to live up to its discovery and due process obligation by speciously claiming that, “Information used for impeachment necessarily requires a witness at trial. The United States’ deadline to disclose its witness list is January 12, 2018... Once the United States finalizes its witness list and decides which co-conspirators and witnesses, including cooperating witnesses, will testify at trial, the United States will ensure that it will then provide to Defendants the *Giglio* material.” In other words, the government has no obligation to disclose *Giglio* impeachment material because it has not made a formal declaration of witness identities. This obfuscation deceptively devised and designed to frustrate the Defendants’ opportunity to prepare for trial and fully investigate the holes in the government’s case. The tactic further ignores that the foundation for *Giglio* are the principles set out in *Brady* and *Giglio* material is quite simply a subset of the type of disclosure that *Brady* has required of prosecutors for more than 50 years. If the government is permitted to get away with this disingenuous tactic, it will have successfully gutted *Giglio*. Not to mention the fact that the government’s Response totally ignores its *Brady* obligations.

preserved evidence; or 2) provided all *Jencks* materials early on, or 3) provided all *Giglio* and *Brady* materials early on. The government chose to do none of these, however.

The Supreme Court has made clear that certain delays, due to their sheer length, are presumptively prejudicial. In *Doggett v. United States*, 505 U.S. 647 (1992), the Court declared that:

Impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown. . . . Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.

Doggett, 505 U.S. at 655. The Supreme Court has made equally clear that the extent to which the defense will be impaired by the delay is “the most serious” of the accused’s interests that warrant constitutional protection: “[T]he inability of a defendant to adequately prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious.” *Barker v. Wingo*, 407 U.S. 514, 532, 92 S.Ct. 2182 (1972). In *Nikens v. United States*, 323 F.2d 808, 813 (D.C. Cir. 1963), *cert denied*, 379 U.S. 905 (1964), Judge Wright in his concurrence explained that:

Indeed, a suspect may be at a special disadvantage when a complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. Each day, the accused becomes less able to make out his defense.

In addition, the Government admitted at the May hearings in this matter that it did not have any specific evidence linking the Gallegos brothers to the Rico Conspiracy as alleged in the indictment for the death of Adrian Burns. The Government stated that it had presented some general evidence. This is gamesmanship 101. This is not a crime that is not able to be prosecuted. The allegations are identical to hundreds of similar homicides that are brought in the State of



New Mexico every year. The United States Government has not pled and does not have sufficient facts to construct the nexus between a run-of-the-mill state homicide and the enterprise to confer jurisdiction upon this Court. See Joe Gallegos' Motion to Dismiss [DOC. 1023][Withdrawn in DOC. 1145]. The prejudice is obvious, the delay unnecessary, and the loss of constitutional validity for this prosecution requires dismissal as does the prejudice that necessarily follows a delay that was devised and designed to insure a tactical victory for the prosecution.

**IV. The Decision to Include Counts Four and Five in the Indictment
Was Based on Tactical Considerations**

The delay was due to tactical considerations. The decision to include the Burns homicide investigations into the superseding RICO indictment was unquestionably tactical. It enabled the prosecution to heap the inflammatory evidence guaranteed to result from the Burns counts to

spill over into the jury's decision-making process on the other counts. The tactical advantage being sought by the government was to bring as many prejudicial charges as it could in an overarching Superseding Indictment in its pursuit of the ultimate political goal-- dismantling the SNM.

The defendant has met his burden of showing both prejudice *and* that the delay was done to secure a tactical advantage for the government.

Consultation

Given the contentious nature of this motion, concurrence wasn't sought from the government pursuant to D.N.M.LR-Cr 47.1.

WHEREFORE, Defendants Gallegos requests an Order from this Honorable Court that Counts Four and Five of the Second Superseding Indictment (Doc. 949) be dismissed.

Respectfully submitted this 13th day of October, 2017.

Respectfully Submitted,

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Counsel for Shauna Gutierrez

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 13th day of October, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and service to all CM/ECF registrants.

/s/ Brock Benjamin
BROCK BENJAMIN

STATE OF NEW MEXICO
SOCORRO COUNTY MAGISTRATE COURT IN SOCORRO

State of New Mexico

v

JOE L GALLEGOS, Defendant

No. M-52-FR-2012-00231

PROBABLE CAUSE DETERMINATION

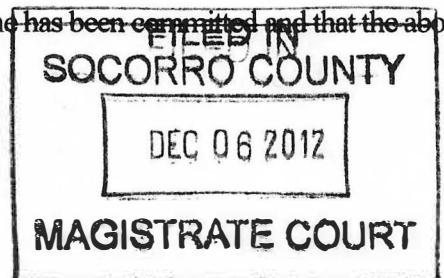
(For use only if the defendant has been arrested without a warrant and has not been released)

Finding of Probable Cause

[] I find that there is a written showing of probable cause to believe that a crime has been committed and that the above named defendant committed it.

It is ordered that the defendant shall be released:

- [] on personal recognizance.
[] on the conditions of release set forth in the release order.



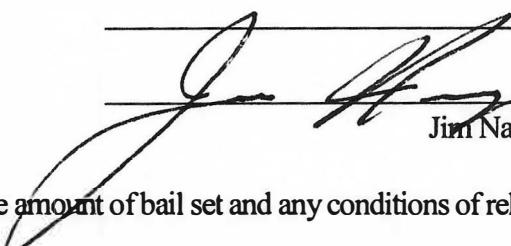
Failure to Make Showing of Probable Cause

[xx] I find that probable cause has not been shown that a crime has been committed and that the above named defendant committed it.

It is therefore ordered that the complaint against the defendant be and the same is hereby dismissed without prejudice and the defendant be immediately discharged from custody.

12-6-12

Date


Time

Jim Naranjo, Judge

Unless the defendant has been released on personal recognizance, the amount of bail set and any conditions of release prescribed by a designee must also be reviewed.

This form is not necessary if the finding of probable cause is endorsed by the judge on the criminal complaint or on a statement of probable cause.

Distribution 1 Copy-Court 1 Copy-Defendant 1 Copy-Prosecutor [Approved effective September 1, 1990.] Criminal Form 9-207A
Court Information:

Socorro County Magistrate Court 102 Winkler
Socorro NM 87801 phone 575-835-2500 (fax) 575-838-0428 web site: www.nmcourts.gov

EXHIBIT "A"

STATE OF NEW MEXICO
SOCORRO COUNTY MAGISTRATE COURT IN SOCORRO

State of New Mexico

v

JOE L GALLEGOS, Defendant

No. M-52-FR-2012-00231

PROBABLE CAUSE DETERMINATION

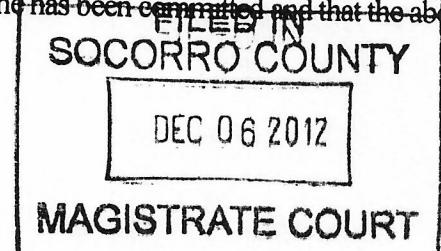
(For use only if the defendant has been arrested without a warrant and has not been released)

Finding of Probable Cause

- [] I find that there is a written showing of probable cause to believe that a crime has been committed and that the above named defendant committed it.

It is ordered that the defendant shall be released:

- [] on personal recognizance.
[] on the conditions of release set forth in the release order.



Failure to Make Showing of Probable Cause

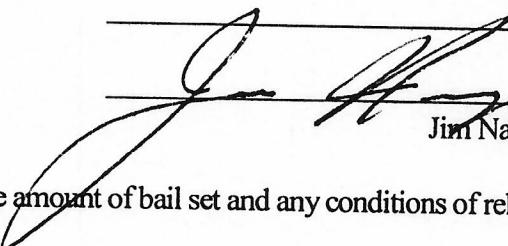
- [xx] I find that probable cause has not been shown that a crime has been committed and that the above named defendant committed it.

It is therefore ordered that the complaint against the defendant be and the same is hereby dismissed without prejudice and the defendant be immediately discharged from custody.

12-6-12

Date

Time


Jim Naranjo, Judge

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REGISTER OF ACTIONS

CASE NO. M-52-FR-2012-00231

State of New Mexico v. JOE L GALLEGOS

§
§
§
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§
§
§

Case Type: Felony
 Date Filed: 11/19/2012
 Location: Socorro County Magistrate
 Court: Socorro
 Judicial Officer: Naranjo, Jim

PARTY INFORMATION

Defendant GALLEGOS, JOE L

Male
5' 7", 190 lbs

Attorneys
 Lee Deschamps
Public Defender
 575-838-0777(W)

Stacey A. Ward
Public Defender
 505-238-5797(W)

Plaintiff State of New Mexico

CHARGE INFORMATION**Charges: GALLEGOS, JOE L**

	Statute	Level	Date
1. Murder in the first degree (felony murder)	30-02-01(A)(2)	Felony	11/12/2012
2. Kidnapping (first degree)	30-04-01	1st Degree Felony	11/12/2012
3. Tampering with evidence (highest crime a third, fourth or indeterminate degree felony)	30-22-05	4th Degree Felony	11/12/2012
4. Murder in the first degree (felony murder) - conspiracy	30-02-01(A)(2)	2nd Degree Felony	11/12/2012
5. Arson property (over \$2,500 but not more than \$20,000)	30-17-05(A)	3rd Degree Felony	11/12/2012

EVENTS & ORDERS OF THE COURT**DISPOSITIONS**

12/06/2012	Disposition (Judicial Officer: Naranjo, Jim)
	1. Murder in the first degree (felony murder) Discharged
	2. Kidnapping (first degree) Discharged
	3. Tampering with evidence (highest crime a third, fourth or indeterminate degree felony) Discharged
	4. Murder in the first degree (felony murder) - conspiracy Discharged
	5. Arson property (over \$2,500 but not more than \$20,000) Discharged

OTHER EVENTS AND HEARINGS

11/16/2012	MTN: MOTION <i>Motion to Seal Court Pleadings (Berry/ADA)</i>
11/19/2012	OPN: CRIMINAL COMPLAINT FILED
11/19/2012	AFFIDAVIT OF ARREST WARRANT
11/19/2012	WAR: ARREST WARRANT ISSUED
11/26/2012	ORD: ORDER FILED <i>Order Unsealing the Court Records</i>
11/26/2012	First Appearance (9:46 AM) (Judicial Officer Naranjo, Jim)
	<u>Parties Present</u>
	Result: Held
11/26/2012	MISCELLANEOUS ENTRY <i>Return of Arrest Warrant: def arrested 11/20/12 by Valencia Co SO</i>
11/26/2012	INDIGENT DETERMINATION FOR DEFENDANT FILED
11/26/2012	ORD: ORDER OF APPOINTMENT <i>Lee Deschamps apptd as Public Defender, assigned by CCU</i>
11/27/2012	ENTRY OF APPEARANCE FILED <i>Entry of Appearance, Request for Speedy Trial & Request for Discovery (Deschamps)</i>
12/06/2012	Preliminary Examination (9:30 AM) (Judicial Officer Naranjo, Jim)
	<u>Parties Present</u>
	Result: Held

EXHIBIT "B"



EXHIBIT "C"

